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No. 80-205
IN THE

Supreme Court of the United States

October Term 1980

HAROLD A. TOSO,

Petitioner,

vs.

CITY OF SANTA BARBARA,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION.

FREDERICK W. CLOUGH,
City Attorney,
City of Santa Barbara,
City Hall,
Post Office Drawer P-P,
Santa Barbara, Calif. 93102,
(805) 963-0611,
Attorney for Respondent.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

Questions Presented.

1. Has a state court reached a proper conclusion when it holds that public discussion of public acquisition of private property, in the absence of any governmental decision to purchase or condemn the property, does not constitute a compensable "taking" of private property for public use within the meaning of the Fifth and Fourteenth Amendments to the United States Constitution?

2. Has a state court reached a proper conclusion when it holds that the denial of an application to rezone private property (which it holds to be a reasonable land use decision supported by substantial evidence and after which the property retains reasonable uses and substantial economic value) does not constitute a "taking" of private property for public use within the meaning of the Fifth and Fourteenth Amendments to the United States Constitution?

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BRIEF OF RESPONDENT IN OPPOSITION.

Statement of the Case.

A. Preliminary Statement.

Petitioner's statement of the case is misleading and inaccurate in numerous instances. Therefore, respondent will set forth below a brief statement of the relevant facts from the record in this case. However, before doing so it should be emphasized that the trial court and the Court of Appeal, in its current opinion, both held that the evidence in this case has not established that the actions of respondent constitute a constitutional "taking" of petitioner's property. The California Supreme Court concurred in that conclusion by denying petitioner's petition for hearing.

It should also be pointed out that petitioner never alleged that any actions of respondent constituted a taking of property for public use in violation of the Fifth Amendment to the United States Constitution. The complaint alleged merely that the conduct of respondent resulted in a de facto

taking of property in violation of the Fourteenth Amendment to the United States Constitution.

Petitioner devoted considerable attention in his brief to the findings of fact adopted by the trial court and to the Court of Appeal's changed perception of the facts in its two opinions.

As for the findings of fact, the respondent has consistently contended in the California courts, and would so contend here, that those findings are without evidentiary support. In its opening brief to the Court of Appeal, respondent argued at length that 13 of the 36 findings of fact adopted by the trial court were not supported by substantial evidence.[1] The Court of Appeal recognized the validity of respondent's contention that there was no legal or evidentiary support for the trial court's finding of fact and conclusion of law that respondent had deprived petitioner of a fair hearing.[2] That the petitioner continues to urge in support of his case the trial court finding that he was deprived of a fair hearing, notwithstanding the recognition by the Court of Appeal of their lack of evidentiary foundation, is reason enough for this Court to decline review. *Southern Power Company v. North Carolina Public Service Company* (1924) 263 U.S. 508 (certiorari dismissed where factual dispute on question whether "evidence sufficed to establish actual dedication of petitioner's property to public use. . . ."). Respondent's challenge to the other findings of fact

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[1]Respondent contended in "Appellant's Opening Brief" that Findings of Fact 12, 14, 15, 17, 19, 21, 22, 23, 27, 28, 31, 32 and 34 were not supported by any substantial evidence.

[2]The Court of Appeal held that petitioner had not been deprived of a fair hearing. It stated as follows: "Appellant argues that, assuming that administrative mandamus was the proper remedy, the trial court erred in concluding that the City Council did not grant respondent a fair trial. Respondent stipulated that there had been no procedural due process violations, and there is no showing that the procedure itself was improper or unfair." (Pet. for Writ of Cert., App. A, p. 9).

were not considered by the Court of Appeal because it reversed, for other reasons, the portion of the judgment which was adverse to respondent.[3] Accordingly, petitioner's reliance on certain of those findings of fact should not be considered without viewing the record to determine whether said findings are supported by any substantial evidence (Clerk's Transcript, Volume I-V, pp. 1-1864; and Reporter's Transcript, Volume I-XI, pp. 1-3002).

As for the petitioner's comparison of the Court of Appeal's perception of the facts in its two opinions, that is completely irrelevant to the issue of whether this case presents any issues worthy of this Court's consideration. The first opinion was vacated by action of the California Supreme Court and is no longer a citable opinion in California.[4] In any event, the only opinion relevant for this Court's consideration is the February 6, 1980 opinion, the review of which is the stated subject of the Petition for Writ of Certiorari.

B. Statement of Facts.

Petitioner entered into an agreement to purchase the Wilcox Property, the subject of this action, in November 1973. Pursuant to the agreement, he was required to purchase the property only if the City approved his application to develop a resort hotel thereon. However, petitioner's right of purchase was not conditioned upon the approval of his resort hotel application. Pursuant to the agreement, petitioner could purchase the property at anytime prior to January 15, 1977 by paying the agreed upon purchase price.[5]

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[3]See Pet. for Writ of Cert., App. A, p. 11.

[4]California Rules of Court, Rules 976 and 977 prohibit the citation of a Court of Appeal opinion superseded by the granting of a hearing by the California Supreme Court.

[5]A copy of the Purchase and Sale Agreement and an amendment thereto are attached hereto as Appendix I.

In February 1974, petitioner filed an application with the respondent to rezone the property to place the resort hotel zone thereon. At the time of his application, the property was zoned single-family residential. The property was surrounded by land zoned for single-family uses. Upon receipt, the respondent began processing petitioner's rezoning application.

At the time of petitioner's rezoning application, the text of the respondent's General Plan included the following statement concerning a resort hotel use on the Wilcox Property:

> "The General Plan *suggests* as one of several *possibilities* other than single-family residential a resort-hotel in which the open quality of the land would be preserved." (Emphasis added).

In June, July and August 1974, as a result of public requests to consider public acquisition of the property, the City Council, during five City Council meetings, held public discussions concerning the possible acquisition of the property. *The City Council made no decision to acquire the property.*

On July 23, 1974, the City Council voted to place an advisory proposition on the November 1974 ballot to secure the voter's opinion of the question of whether the respondent should purchase the Wilcox property.

On June 6, 1974, the respondent's Planning Commission began its consideration of petitioner's rezoning application. At the commencement of the hearing, it was advised by the Assistant City Attorney that it should not consider the question of the public acquisition of the Wilcox Property, but rather was limited to determining whether or not, from a zoning and planning standpoint, the property should be rezoned to the resort hotel zone. The Planning Commission

chairman then stated that any speakers who talked about acquiring the land as a park would be ruled out of order. Consequently, during the Planning Commission hearings there was no consideration whatsoever of the public acquisition of the property.

On October 7, 1974, the Planning Commission determined that the intrusion of a commercial hotel into the single-family residential area surrounding the Wilcox Property was an improper land use and denied petitioner's rezoning application.[6]

On November 5, 1974, the voters approved the advisory ballot proposition by a vote of 13,422 to 11,402.

On November 12, 1974, the City Council commenced a hearing on petitioner's appeal of the Planning Commission's decision. At the commencement of the hearing, the City Attorney read a statement which had been approved by the City Council. Among other things, the statement provided that, based on legal instructions from the City Attorney, the City Council would totally divorce any individual desires to purchase the Wilcox Property from the hearing and would handle the appeal solely on its merits. *It also stated that the City Council had not decided to purchase or acquire the property.*

On November 26, 1974, at the conclusion of the hearing on petitioner's appeal, the City Council concluded that a resort hotel was not an appropriate land use of the property and denied petitioner's appeal. There was no consideration whatsoever during the hearing concerning public acquisition of the property.

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[6]A copy of the resolution of the Planning Commission denying petitioner's resort hotel application and setting forth the findings therefor is attached hereto as Appendix 2.

By letter dated February 3, 1975, *the City Attorney advised petitioner's attorney that the respondent did not intend to condemn the Wilcox Property* and that the petitioner and the legal owners were free to develop it under its existing single-family zoning.

On August 5, 1975, *the City Council adopted a resolution stating that it had no present or future intention of acquiring the Wilcox Property*.

On October 28, 1975, the City Council rezoned the Wilcox Property to place the Planned Unit Development (PUD) zone thereon as an alternative zone so that it would be developed either as a planned unit development or as a single-family subdivision under its existing single-family residence zoning.

At the time of trial, the property was worth at least $600,000 under its existing zoning, according to petitioner's appraiser.

Petitioner failed to exercise his right to purchase the Wilcox Property and develop it as a PUD or single-family residence subdivision, and his right to purchase expired on January 15, 1977.

During the trial, a senior planner of the Regional Coastal Commission in charge of the review of projects in Santa Barbara testified that the Regional Coastal Commission staff had not formed any opinion concerning the appropriate use of the subject property.

On February 26, 1980, respondent approved the subdivision of the subject property into 68 residential lots.[7]

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[7]A copy of the Resolution of the City Council of respondent approving the subdivision is attached hereto as Appendix 3.

Summary of Argument.

1. The petitioner asserts that this is an appropriate case for this Court to determine the issue left unresolved by this Court in *Agins v. City of Tiburon* (1980) 24 Cal.3d 266; affirmed, 100 S.Ct. 2138. That issue is whether invalidation is the only remedy available to a person whose land has been taken without just compensation through an exercise of the police power which deprives the land of all reasonable and beneficial uses.

The petitioner's assertion is not well founded since in the instant case, the actions of respondent of which petitioner complains did not deprive the subject property of all reasonable use and value. The property still retains the single-family residential zoning it possessed at the time petitioner applied to respondent to have the property rezoned to permit his proposed resort hotel development. In addition, the property possesses an alternative zoning which would permit it to be developed as a planned unit development. These are reasonable uses. At the most, respondent's action merely caused a diminution in the value of the subject property since petitioner's appraiser testified at trial that the property was worth $600,000. A diminution in the value of private property caused by a zoning action which does not deprive the property of all reasonable use and value has never been held to constitute a taking of private property prohibited by the Fifth and Fourteenth Amendments to the United States Constitution.

2. Petitioner asserts that since the Court of Appeal reversed the portion of the trial court's judgment which ordered the subject property rezoned to the resort hotel zone, there is no remedy for petitioner.

The Court of Appeal held there was no remedy because respondent's action in denying an application to rezone the

subject property to permit the construction of a commercial hotel in an area zoned and developed with residential uses was both reasonable and supported by substantial evidence. The Court of Appeal held there was no taking as a result of the zoning action because the property retained reasonable use and economic value. In summary, petitioner has no remedy simply because he was not legally entitled to one.

3. The fact that petitioner did not exercise his right to purchase the subject property is presented by petitioner as evidencing that there has been a "taking" of a property right by respondent.

Petitioner had no vested right to build a resort hotel on the subject property. Therefore, the respondent's refusal to grant his rezoning request did not deprive him of any property interest. His right to purchase the property was not contingent upon the approval of the resort hotel rezoning application. He could have purchased the property at any time until January 15, 1977 by paying the agreed upon purchase price to the owners. The fact that petitioner decided not to follow through with his purchase and develop it with a single-family subdivision or a planned unit development, uses which have substantial value, certainly does not establish a "taking" by respondent.

4. Petitioner contends that this Court should use the instant case to resolve the conflict between the courts of various states as to what constitutes a de facto taking of private property by governmental action.

A resolution of that conflict will not benefit petitioner since California is already amongst the majority of jurisdictions which provide compensation for de facto takings, and the Court of Appeal opinion holding that respondent's actions do not constitute a de facto taking are consistent with both California case law and this Court's opinion in

Agins v. City of Tiburon, supra. Respondent's consideration of the acquisition of the subject property lasted less than eight months and resulted in a decision *not* to acquire the property. None of the cases cited by petitioner can be construed as even remotely suggesting that the respondent's actions constitute a de facto taking or other compensable precondemnation activity.

5. The instant case is clearly distinguishable from *San Diego Gas and Electric Company v. City of San Diego*, No. 79-678, in which an appeal is presently pending before this Court. That appeal involves the issue of whether the sole remedy for a zoning action which a trial court has held deprived private property of all practical, beneficial or economic use is invalidation, rather than damages for inverse condemnation. In the instant case, the zoning action did not deprive the property of all practical, beneficial or economic use. The subject property herein retains the reasonable and economic uses of single-family subdivision or planned unit development. Accordingly, this case will not be affected by whatever action this Court takes in *San Diego Gas and Electric*.

ARGUMENT.

I.

The Lower Court Decision Neither Conflicts With Any Federal or State Court Decisions, nor Raises Any Important Questions of Federal Law.

A. The Lower Court Decision Correctly Concludes That Petitioner Is Not Entitled to a Remedy Because the Subject Property Has Not Been "Taken" and Because the Challenged Action Was Reasonable and Supported by Substantial Evidence.

Petitioner argues that this case is significant because it is the first California case following *Agins v. City of Tiburon* (1980) 24 Cal.3d 266, affirmed, 100 S.Ct. 2138, in which

a property owner has received the remedy of invalidation from the trial court only to have it taken away by an appellate court. The result proclaims petitioner is that what he refers to as the "aggrieved landowner" has no remedy. However, petitioner has overlooked the obvious. The petitioner has no remedy because there has been neither a "taking" of the property nor any unreasonable exercise of the police power by respondent.

The California Supreme Court, in *Agins v. City of Tiburon, supra*, held that if the exercise of the police power deprived the property of all economic use, it was unconstitutional as a "taking" and that the proper remedy was to invalidate the governmental action. However, in the instant case, respondent did not exercise its police power in a manner which deprived the subject property of all economic value or reasonable uses. At most, respondent's refusal to rezone the property to the resort hotel zone merely diminished its value. It retained its single-family residential zoning, which is a reasonable use for the property. In fact, the property recently has been subdivided for that purpose. Petitioner's appraiser testified that the property at the time of trial had a value of $600,000. This Court has uniformly rejected the proposition that diminution in property value caused by an exercise of the police power constitutes a "taking" of property under the United States Constitution. *Euclid v. Ambler Realty Co.* 272 U.S. 365 (1926); *Hadachek v. Sebastian* 239 U.S. 394 (1915); *Goldblatt v. Hempstead* 369 U.S. 590 (1962); *Penn Central Transp. Co. v. New York City* 438 U.S. 104 (1978).

The fact that the subject property may be more valuable with resort hotel zoning does not mean that respondent's failure to rezone the property constitutes a taking. *United States v. Central Eureka Mining* (1958) 357 U.S. 155, 167; *Steel Hill Development, Inc. v. Town of Sanbornton* 490

F.2d 956, 963 (1972, 1st Cir.); *C. F. Lytle v. Clark* 491 F.2d 834, 838 (1974, 10th Cir.); *South Terminal Corp. v. Environmental Protection Agency* 504 F.2d 646, 678 (1974, 1st Cir.); *De-Tom Enterprises, Inc. v. United States* 552 F.2d 337 (1977, Ct. Cl.).

Petitioner places great emphasis on the fact that he did not exercise his right to purchase the subject property and that said right expired on January 15, 1977. Therefore, even if the Court of Appeal had affirmed the trial court's decision requiring the respondent to rezone the subject property, that remedy would not have benefited petitioner. Although it is not entirely clear from the petition, it appears that petitioner is contending that his decision not to exercise his right to purchase the property, purportedly because he could not develop it as a resort hotel, constitutes a taking by respondent of his interest in the property. Such a result would place the holder of an unexercised right to purchase real property in a better position than the legal owner. The legal owner does not have a cause of action for a "taking" because the property retains reasonable and beneficial uses. Certainly, the petitioner who has failed to exercise his right to purchase the property and develop it as single-family subdivision or planned unit development cannot bootstrap himself into a "taking" by that failure. A similar argument was rejected in *Southpark Square Ltd. v. City of Jackson* 565 F.2d 338 (1977, 5th Cir.), cert. den. 436 U.S. 946. In that case, plaintiff contended that the city's denial of a building permit, which ultimately resulted in its loss of the property for inability to obtain financing, was a compensable taking. The Court of Appeal concluded that the plaintiff "lost its property as a direct consequence of its own financial arrangements and tactical decision, not because the City committed any act remotely resembling a taking" (p. 343). That reasoning is equally applicable to the instant case.

B. The Lower Court's Decision Does Not Conflict With This Court's Holdings in Nectow v. Cambridge or in Arlington Heights v. Metro Housing Corp.

Petitioner argues that the lower court's decision defies this Court's decisions in *Nectow v. Cambridge* 277 U.S. 183 (1928) and in *Arlington Heights v. Metro Housing Corp.* 429 U.S. 252 (1977). Petitioner's contentions are both misleading and without merit.

In *Nectow v. Cambridge*, this Court merely held that a zoning ordinance which did not permit any practical use of private property was invalid. The lower court decision does not conflict with that holding since the respondent's denial of petitioner's resort hotel zoning application did not affect the existing single-family residential zoning on the property which was clearly a reasonable and economic use of the property.

Petitioner's statement, at p. 14 of his petition, that the trial court's findings show actions aimed at the improper purpose of facilitating cheaper acquisition of the subject property by respondent is false. As stated by the lower court (Petition for Writ of Certiorari, Appendix A, p. 23), the trial court did not find that any actions of respondent were intended to freeze or lower the value of the land in order to permit its purchase at a lower price.

Next, petitioner argues that the lower court decision conflicts with this Court's decision in *Arlington Heights v. Metro Housing Corp., supra,* because it holds that if there is any reasonable basis for a zoning decision, the motives or intentions of the local legislative body cannot be inquired into. Petitioner represents that *Arlington Heights* stands for the proposition that judicial inquiring into the motives or intentions of local legislators in making zoning decisions is proper. Petitioner's contention in this regard is very de-

ceptive, and his quotation of selected language from the opinion is extremely misleading. In *Arlington Heights*, the plaintiff alleged that the local legislative body's denial of its rezoning request was racially discriminatory. This Court's statement at 429 U.S. at 266 (Petition for Writ of Certiorari, p. 15) concerning judicial inquiry into legislative motivation in zoning actions was limited to the issue of racial discrimination. This is clear from the following language from this Court's opinion immediately preceding and immediately following that quoted by petitioner on page 15 of the petition, which petitioner conveniently omitted:

> "Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one.[11] In fact, it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality. But *racial discrimination* is not just another competing consideration. . . ." (quotation in Petition omitted).
>
> "The impact of the official action—whether it bears more heavily on one race than another." (Emphasis added).

Outside the limited area of alleged racial discrimination, this Court has consistently held that motives or intentions of legislators are irrelevant for determining the validity of their actions.[8]

Moreover, contrary to petitioner's contention, the lower court decision does not hold that inquiry into legislative

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[8]*Soon Hing v. Crowley* (1885) 113 U.S. 703, 710-711; *United States v. Morgan* (1941) 313 U.S. 409, 422; *United States v. O'Brien* (1968) 391 U.S. 367, 383.

motivation in zoning actions allegedly taken to depress the value of private property pending public acquisition is prohibited. Rather, it concludes that since there was no showing or finding in the instant case that respondent's actions were intended to freeze or lower the value of the subject property in order to purchase it at a reduced price, it did not have to resolve that question. (Pet. for Writ of Cert., App. A, p. 23).

This Court's consideration of the issue of the propriety of judicial inquiry into legislative motivation in inverse condemnation cases would have no bearing on this case since the trial court permitted such inquiry, but did not find that respondent's actions were motivated by a desire to depress the value of the subject property pending public acquisition.[9]

In summary, the remedy for exercises of the police power which deprive private property of all reasonable uses and economic value clearly exists in California. As stated by the California Supreme Court in *Agins v. City of Tiburon, supra,* that remedy is invalidation. The fact that the lower court decision herein did not provide a remedy for petitioner is not evidence that the holding in *Agins* is improper. The petitioner has no remedy because his property was not "taken." At most, respondent's actions caused merely a diminution in the value of the subject property since the denial of petitioner's rezoning application continued the existing single-family residential zoning on the property which is a reasonable and economic use for the property. In addition, respondent gave the property the additional alternative use of planned unit development.

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[9]The trial court had permitted significant inquiry concerning City Council motivation. Every member of the City Council was required to testify during the trial.

C. The Lower Court's Decision Is Consistent With This Court's Decision in Agins v. City of Tiburon.

In *Agins v. City of Tiburon, supra*, the plaintiff, *inter alia*, contended that certain precondemnation activities of the city constituted a "taking." The California Supreme Court rejected this contention, stating:

> "It is manifest that general land-use planning discussion and related decision making by elected officials must be both unhampered and public. Together or singly, neither process constitutes a 'taking' of the property under consideration. Any other conclusion would violate sound public policy." (p. 278).

This Court, in affirming the California Supreme Court's decision, stated in footnote 9 to its opinion that the California Supreme Court correctly rejected the Agins' contention that the city's precondemnation activities constituted a taking. This Court further stated:

> "Even if the appellants' ability to sell their property was limited during the pendency of the condemnation proceedings, the appellants were free to sell or develop their property when the proceedings ended. Mere fluctuations in value during the process of governmental decision making, absent extraordinary delay, are incidents of ownership. They cannot be considered as a 'taking' in the constitutional sense." [*Agins v. City of Tiburon* (1980) 100 S.Ct. 2138, 2142.]

This holding is equally applicable to the instant case since the precondemnation activities alleged in *Agins* were much more extensive and had a more adverse impact than the actions of respondent which petitioner contends constitutes inequitable precondemnation activities. This is apparent from the following brief review of the facts in *Agins:*

a. In January 1972, the city retained two private consultants, Dean Witter and Williams & Moline, to prepare reports concerning open space acquisition by the city;

b. In July 1972, the city received a report from Dean Witter, a financial consultant, that recommended that the purchase of open space land by the city be financed through the issuance of $1.25 million of general obligation bonds;

c. In October 1972, the city received a report from Williams & Moline, a planning consultant, which focused on possible land use designations *and* recommended that the city attempt to acquire the Agins' property, along with other property, for open space purposes;

d. In October 1972, at an election, the city passed an open space bond issue in the amount of $1.25 million and proceeded to sell the bonds;

e. On June 28, 1973, the city adopted an open space ordinance which downzoned the Agins' property;

f. On December 4, 1973, the city filed an eminent domain action to acquire the Agins' property;

g. On November 1, 1974, the city abandoned its eminent domain action.

By way of comparison, in the instant case, respondent's City Council held five public hearings concerning the possible acquisition of the property which did not result in a decision to acquire the property. It then placed on the ballot an advisory proposition concerning the purchase of the property which passed by a small margin. Finally, it denied petitioner's application to *upzone* the property from single-family residential to a resort hotel zone. Prior to denying the application, the City Council stated that it had made no decision to acquire the property. On February 3, 1975, the City Attorney advised petitioner's attorney by letter that the City did *not* intend to condemn the property and that he and

the legal owners were free to develop it under its existing single-family zoning.

These events all took place in the seven and one-half month period from June 11, 1974, when the first City Council consideration of acquisition took place, until February 3, 1975, when petitioner was advised that the City did not intend to condemn the property. The City Council *never* decided to acquire the property.

In comparing the facts in *Toso* to those in *Agins*, the following is apparent:

a. In *Agins*, the period of public consideration of acquisition was much longer than in *Toso* (13 months versus 7½ months).

b. In *Agins*, a decision to condemn was made whereas no such decision was made in *Toso*.

c. In *Agins*, the property was downzoned after being designated for acquisition whereas in *Toso*, the City refused to upzone the property and never designated the property for acquisition.

From this analysis, it is apparent that the city's actions in *Agins* were much more adverse to the property owner than those in *Toso*, but were held by this Court not to constitute inequitable precondemnation activities. It follows, therefore, that the lower court's decision in the instant case is entirely consistent with this Court's decision in *Agins* and that the actions of respondent do not constitute a "taking."

D. The Lower Court Decision Is Consistent With California Case Law Which Has Provided as Much Protection for Private Property Owners From Governmental Acquisition Activities as Any State Court or Federal Circuit in the Country.

Finally, petitioner contends that this Court should use the instant case as a vehicle for resolving the conflict which

petitioner believes exists between decisions of the courts of various states as to what constitutes a de facto taking of private property by governmental action. In essence, petitioner is asking this Court to resolve the conflict between the state courts on this issue by holding that those jurisdictions which follow the holding in *City of Buffalo v. J. W. Clement, Inc.* (1971) 28 N.Y.2d 241, that there can be no de facto taking for precondemnation activities, are in violation of the U.S. Constitution. Such a decision will not benefit petitioner because, as explained below, California courts have *not* followed *Clement* and *do* provide compensation for de facto takings.

The courts in California have provided greater protection for private property owners from governmental acquisition activities than those of practically any state or federal circuit in the country. In California, a property owner is compensated for de facto takings caused by precondemnation activities (*Peacock v. County of Sacramento* (1969) 271 Cal.App.2d 845). If a condemnation action is filed, his property is valued as though any governmental action which was taken to diminish its value did not occur (*People Ex Rel. Dept. of Public Works v. Graziadio* (1964) 231 Cal.App.2d 525). If a governmental agency states its intention to condemn property and then acts unreasonably by excessively delaying the eminent domain action or by other oppressive conduct, the property owner is entitled to be compensated for any diminution in value caused thereby (*Klopping v. City of Whittier* (1972) 8 Cal.3d 39). Against the background of these cases, the lower court decision herein has concluded that there has been no "taking" by respondent and the California Supreme Court has concurred in that result by denying petitioner's petition for hearing.

In addition, the facts of cases cited by petitioner on pages 17-19 of his petition bear no more resemblance to those of

the instant case than does an elephant resemble a flea. Of the 15 cases cited by petitioner as providing compensation for de facto takings, 10 involved either redevelopment projects in which the subject property was designated for acquisition for periods ranging from 3½ years (*Maxey v. Redevelopment Authority* (1980) 288 N.W.2d 794) to 10 years (*Foster v. Detroit* 405 F.2d 138 (6th Cir. 1968)) or highway projects for which the subject property was designated for acquisition for similar extended periods of time. In the instant case, respondent has never designated the subject property for acquisition. As stated by Washington Supreme Court in *Lange v. State* (1976) 547 P.2d 287, 288, in order for there to have been a de facto taking "the condemning authority must have evidenced an unequivocal intention to take the specific parcel of land."[10] In addition, in the cases cited by petitioner, the government actions rendered the subject property practically valueless. In the instant case, the property has substantial value and reasonable uses.

The other five cited cases are also inapposite. *Peacock v. County of Sacramento, supra*, is a California case in which the plaintiff was denied any beneficial use of his land for five years while the County designated the property for acquisition as a part of a planned airport expansion. *United States v. Certain Lands In Truro etc.* 476 F.Supp. 1031 (1979, D. Mass.) is not a de facto taking case, but rather a case in which the court held that the plaintiff's land in a federal eminent domain action should be valued pursuant to the zoning it had held prior to being downzoned at the request of the federal government. In *Drakes Bay Land Co. v. United States* 424 F.2d 574 (1970, Ct. Cl.), the actions

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[10]Even the enactment of legislation which authorizes condemnation of property cannot be a taking. Such legislation may be repealed or modified, or appropriations may fail. *Danforth v. United States*, 308 U.S. 271, 288.

of federal employees over a seven-year period which deprived the plaintiffs of any reasonable use of their property were held to constitute a taking. In *Benenson v. United States*, 598 F.2d 939 (1977, Ct. Cl.), the actions of the defendants in prohibiting remodeling or demolition of the building on plaintiff's property while considering its acquisition over a four-year period were held to constitue a taking of all beneficial use of the property.

In *City of Austin v. Teague* 570 S.W.2d 389 (1978, Tex.), the city's denial of three successive development permits applied for by the property owner over a two-and-one-half-year period, which were consistent with existing zoning, was held to constitute the temporary acquisition of a scenic easement. In the instant case, the respondent did not deny a development permit for a use permitted by the existing zoning, but rather denied a request to upzone the property.

The Court's attention is directed to the case of *Briggs v. State of California* 98 Cal.App.3d 190; app. dism. 100 S.Ct. 3005. In *Briggs*, a coastal permit, which was a prerequisite to any development on the property, was denied by the State Coastal Commission on August 8, 1973. This action followed a communication from the Director of Parks and Recreation of the State of California that a site was desirable for State acquisition. This was followed by two years of acquisition discussion between representatives of the property owner and of the state after which the plaintiff filed an inverse condemnation action contending that the permit denial, coupled with the state official's statement that the property was desirable for acquisition, constituted a taking or damaging of the subject property. The state subsequently filed an eminent domain action to acquire the property which was stayed pending resolution of the inverse condemnation action. The Court of Appeal held that there was no taking or damaging in that: (1) the coastal permit was denied for

reasons independent of the state's acquisition interest and (2) the state's expression of interest in acquisition did not constitute a statement of intention to condemn. (See also *Helix Land Co. v. City of San Diego* (1978) 82 Cal.App.3d 932, 945-948; *Friedman v. City of Fairfax* (1978) 81 Cal.App.3d 667, 677; *City of Walnut Creek v. Leadership Housing Systems, Inc.* (1977) 73 Cal.App.3d 611.) Similarly, in the instant case, the reasons for respondent's denial of the petitioner's rezoning application were completely independent of any acquisition consideration (see Appendix 2) and the respondent never stated any intention to condemn the property.

Petitioner has not cited any case in which public consideration of public acquisition of private property which is concluded in less than eight months with a decision by a public entity *not* to acquire the property and with the property owner being advised that he is free to develop the property under the existing zoning has been held to constitute a "taking" of property for public without just compensation within the meaning of the Fifth and Fourteenth Amendments to the United States Constitution. A holding that such action constituted a taking would stifle the receipt of public input and citizens' views concerning public acquisition of private property which is essential in a democratic society.

E. The Instant Case Is Clearly Distinguishable From San Diego Gas and Electric Company v. City of San Diego.

The case of *San Diego Gas and Electric Company v. City of San Diego*, No. 79-678, in which an appeal is presently pending before this Court, raises the legal question, not answered by this Court in its opinion in *Agins, supra*, of whether the sole remedy available to a property owner whose property has been deprived of all reasonable use and eco-

nomic value by an exercise of the police power is invalidation of the action, rather than damages for inverse condemnation.

In *San Diego Gas and Electric*, through a downzoning and general plan amendment, the city changed the uses permitted on the subject property from industrial to agricultural open space. Although the property owner never applied to the city for approval of any development on the property, the trial court found that the actions of the city deprived the plaintiff of "all practical, beneficial, or economic use of the property."

Since the plaintiff in *San Diego Gas and Electric* never submitted a development plan for approval, the issue of exhaustion of administrative remedies presents a significant preliminary legal issue for resolution by this Court. However, assuming the appellant is able to overcome that threshold, and perhaps insurmountable problem, that case is closer to a proper vehicle for resolution of the question left undecided by this Court in *Agins* since there was a trial court finding that the property had no practical, beneficial or economic use. On the other hand, the instant case in a case involving a diminution in value, not the deprivation of all reasonable use or economic value. As discussed previously, the property can be developed either as a single-family subdivision or as a planned unit development, both of which are reasonable uses. Respondent did not downzone the property, but rather refused to upzone it to permit a commercial use in a residential neighborhood. Petitioner's expert testified at trial in 1974 that the property had a value of $600,000.

This case involves the issue of whether public discussion of acquisition not culminating in a governmental decision

to acquire constitutes a taking of private property. For that reason, the case is clearly distinguishable from *San Diego Gas and Electric*.

Conclusion.

The petitioner has neither shown a conflict between the lower court decision and any federal or state court decision nor raised any important question of federal law. The petitioner is merely a disgruntled developer who was unable to secure the rezoning of land which he did not own to facilitate his desired type of development on the land in the event he decided to purchase it. The lower court's decision that the action of respondent in denying petitioner's rezoning request was a reasonable land use decision which did not deprive the property of a reasonable and beneficial use and was not a taking is fully consistent with applicable decisions of this Court. Respondent's consideration of acquisition of the property over a less than eight-month period is merely an example of governmental decision making which this Court has held is not a "taking" in *Agins v. City of Tiburon, supra*.

For the reasons stated herein, respondent respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

FREDERICK W. CLOUGH,
City Attorney,
Attorney for Respondent.

APPENDIX 1.

Agreement of Purchase and Sale.

THIS AGREEMENT is made November 30, 1973 by and between Whitney A. Collins, trustee u/w Margaret Whitney Wilcox; Whitney A. Collins, trustee u/w Roy F. Wilcox; Dede Wilcox Eddy; Denis H. Wilcox; Richard K. Wilcox; Julia Collins Haselton; Crocker National Bank, successor trustee u/w Margaret Whitney Wilcox; and Crocker National Bank, successor trustee u/w Roy F. Wilcox; all hereinafter collectively referred to as "Sellers" and Harold A. Toso, hereinafter referred to as "Buyer".

1. *Sale and Purchase.*

Sellers agree to sell to Buyer and Buyer agrees to buy from Sellers, subject to the terms, provisions and conditions of this Agreement, all of that certain real property more particularly described in Exhibit "A" attached hereto and by this reference made a part hereof.

2. *Consideration.*

Buyer shall pay to Sellers as and for the purchase price of the above described real property herein agreed to be sold and purchased (hereinafter sometimes referred to as "said real property") the total sum of One Million Two Hundred Thousand Dollars ($1,200,000.00), (subject to any adjustment pursuant to Paragraph 10) which said purchase price shall be payable as follows:

(a) On or before January 15, 1974 Buyer shall pay to Sellers outside of escrow a sum equal to two-twelfths (2/12) of the total amount of all city, county and special district taxes, levies and assessments as shown on the 1973-1974 tax statements for said real property, and thereafter on or before the fifteenth day of each and every calendar month until the escrow hereinafter provided for shall close or shall terminate without closing

in accordance with the provisions of this Agreement, Buyer shall pay to Sellers outside of escrow a sum equal to one-twelfth (1/12) of the total amount of such taxes, provided, however, that for any month after the 1974-1975 tax statements are received by Sellers said sum shall be one-twelfth (1/12) of the amount of taxes, levies and assessments shown thereon.

If said escrow shall close in accordance with the terms hereof, all sums paid by Buyer to Sellers outside of escrow pursuant to the provisions of this subparagraph (a) shall be credited to said purchase price.

(b) Upon the close of the escrow hereinafter provided for there shall be paid to Sellers the full amount of said purchase price less the credit for sums theretofore paid by Buyer to Sellers outside of escrow in accordance with the provisions of the preceding subparagraph (a) of this Agreement.

3. *Escrow.*

Upon the execution of this Agreement the same shall become a binding contract of purchase and sale upon the terms hereof and the parties shall in pursuance thereof forthwith enter into an escrow agreement with Crocker National Bank as escrow holder, executing the usual form of instructions employed by said escrow holder, calling for the performance of this Agreement in accordance with its term, provisions and conditions and within the period of time provided herein. All documents and payments required of the parties (excepting payments herein provided to be made to Sellers outside of escrow) shall be delivered into such escrow. Said escrow instructions shall be and shall be therein expressly stated to be for the purpose of implementing this Agreement of Purchase and Sale and shall not be deemed to modify or affect the terms hereof.

Said escrow shall close on or before sixty (60) days after Buyer shall have received the approval of the City of Santa

Barbara and any and all other governmental bodies, agencies and commissions whose approval is necessary for the Buyer's development of said real property in accordance with Paragraph 14 and the times for filing of a referendum petition to overturn any such approval and for appeals from any action with respect to such development by any governmental body, agency or commission have expired, but in no event later than November 30, 1974, except as extended as hereinafter provided.

If, on November 30, 1974, all approvals provided for by the preceding paragraph shall have been received, but the times for filing such a referendum petition and any such appeal shall not have expired, and Buyer shall not be in default of any obligation under this Agreement, Buyer shall have the right to extend said escrow until thirty (30) days after the expiration of the times for filing such a petition and any such appeal; or if any such appeal shall be filed prior to the expiration of the time therefor, then Buyer shall have the right to extend said escrow until the action from which such appeal was taken shall have become final; but during any such period of extension Buyer shall continue to make the payments to Sellers required by subparagraph (a) of Paragraph 2.

Anything in the foregoing provisions of this Paragraph 4 to the contrary notwithstanding, in no event shall the time for the close of said escrow continue beyond January 15, 1977.

Buyer shall have the right to cause said escrow to close at any earlier time than as specified in this Paragraph 3 by so notifying the Sellers and the escrow holder and by depositing the sums and documents required therefor by the provisions of Paragraph 2 of this Agreement.

4. *Title Insurance.*

Sellers shall furnish and pay for a standard owner's policy of title insurance issued by Security Title Insurance Company and to be in the face amount of One Million Two Hundred Thousand Dollars ($1,200,000.00). Buyer acknowledges that he has examined Security Title Insurance Company's Preliminary Report bearing its Number 169577 as of January 3, 1972, which said Preliminary Report covers said real property, and Buyer expressly agrees to accept title to the said real property and said policy of title insurance shall show title thereto to be vested in the Buyer subject to current taxes and all other matters shown in said Preliminary Report. Sellers agree that prior to the close of the escrow hereunder the existing lease of a portion of said real property to Keeline-Wilcox Nurseries, Inc. will be cancelled.

5. *Prorations.*

All real property taxes, assessments and rents affecting said real property shall be prorated as of the close of escrow.

6. *Entire Document.*

This document constitutes the entire agreement between the parties and there are no oral agreements. This Agreement may be modified only in writing.

7. *Charges.*

Sellers shall pay one-half (½) of the escrow fee, all of the cost of the preparation of the Deed and all of the cost of necessary documentary stamps thereon. Buyer shall pay one-half (½) of the escrow fee, the cost of the preparation of the Deed of Trust and all recording costs.

8. *Benefit and Assignment.*

Buyer shall have the right to assign or transfer his rights hereunder but no such assignment shall relieve the Buyer of any obligation or liability hereunder.

This Agreement shall inure to the benefit of and shall bind the respective heirs, successors and assigns of the parties hereto, as the case may be.

9. *Other Instruments.*

The parties hereto agree to execute the escrow instruction hereinabove provided for and any and all other documents necessary or appropriate for the carrying out of the purposes of this Agreement.

10. *Default by Seller.*

If, prior to the time hereinabove provided for the close of escrow, title to said real property shall not in the condition as hereinabove in Paragraph 4 required, then unless Buyer elects to accept and approve such title as shall then be in Sellers this Agreement shall cease and terminate as to any obligation of either party to the other and shall be deemed cancelled and void by mutual consent without liability of either party to the other, and in such event all sums and instruments deposited in said escrow by Buyer and paid by Buyer to Sellers outisde of escrow pursuant to the provisions of this Agreement shall be returned to Buyer.

Anything in this Paragraph 10 to the contrary notwithstanding the purchase by the County of Santa Barbara prior to close of escrow pursuant to the option provisions of the lease referred to in Exception No. 13 of the Preliminary Report hereinabove referred to shall not constitute a defect in the condition of title under the provision of this Paragraph 10 or of Paragraph 4, and this Agreement shall not be deemed terminated or cancelled by reason thereof, and this Agreement shall be and remain in full force and effect and shall be performed by the parties in all other respects. In such event, however, the purchase price provided for by Paragraph 2 of this Agreement shall be reduced by the amount of the net proceeds received by Sellers upon such

purchase by the County of Santa Barbara and the property so purchased by the County of Santa Barbara shall be excluded from the property to be sold and purchased hereunder.

No voluntary change shall be made by Sellers in the condition of the title of said real property between the date hereof and the close of escrow from that provided for by Paragraph 4 hereof.

11. *Destruction or Damage.*

No damage to said real property or any part thereof prior to the close of escrow shall relieve Buyer of any duty, obligation or liability arising hereunder.

12. *Engineering and Planning Studies.*

Sellers are in possession of certain engineering and planning studies heretofore made with regard to said real property. Sellers agree to deliver to Buyer at no charge to Buyer copies of all of such studies.

13. *Default by Buyer.*

If Buyer shall fail to perform as required hereunder for any reason whatsoever other than as expressly permitted by the terms of this Agreement, or fail or refuse to comply with said escrow instructions, or fail to purchase said real property in accordance with the terms hereof, it is expressly understood and agreed that all sums paid by Buyer to Sellers outside of escrow in accordance with the provisions of Paragraph 2 hereof shall be retained by Sellers.

Sellers and Buyer further expressly agree that said sums have been agreed upon as liquidated damages to be retained by Sellers in any of such events in order to avoid the costs, expenses, delays and uncertainties of litigation and, further, because it is agreed that it would be impractical and extremely difficult to ascertain the amount of money damages which would otherwise be allowable to Sellers for Buyer's

default because of the difficulty of establishing all of the relevant factors bearing thereon, such as but not limited to the dynamic character and resulting fluctuations of the price of real property at this time; the absence of other similar property in or near the location of said real property; the period for which Sellers are obligated to remove said real property from the market hereunder; and the unique value to Sellers of the terms of this Agreement over other offers received by Sellers for the purchase of said real property.

14. *Development Plans and Governmental Approvals.*

As soon as practicable after the execution of this Agreement Buyer shall commence and proceed with diligence with the preparation of a development plan for said real property.

As soon as practicable Buyer shall commence and shall proceed with diligence with all necessary applications and proceedings to and before the City of Santa Barbara and any and all other appropriate governmental bodies, agencies and commissions necessary for the development of said real property in accordance with said development plan.

Sellers agree to cooperate with Buyer in all such applications and proceedings and shall execute any documents which may be necessary therefor. Buyer shall pay all fees and charges incurred in connection with such applications and proceedings and shall save and hold Sellers and each of them harmless from any and all liability, cost and expense in connection with such applications and proceedings.

Buyer shall give to Sellers monthly written reports on the status of all such applications and proceedings.

If at any time prior to the close of the escrow hereunder and notwithstanding the exercise by Buyer of diligence in his efforts to obtain the necessary approvals of the City of Santa Barbara and of any and all other governmental bodies,

agencies and commissions for the development of said real property in accordance with said development plan, any such necessary approval shall have been denied, or any such approval shall have been overturned upon a referendum election, Buyer shall be entitled to terminate said escrow by written notice delivered to Sellers and upon such notice this Agreement shall cease and terminate as to any obligation of either party to the other and shall be deemed cancelled and void by mutual consent without liability of either party to the other, provided, however, that in such event Sellers shall nevertheless retain all sums theretofore paid by Buyer to Sellers outside of escrow as consideration for entering into this Agreement.

15. *Reservation of Mineral Rights.*

The Deed from Sellers to Buyer hereunder shall reserve to Sellers, their heirs, successors and assigns, in undivided interests in the fractions set forth opposite their signatures to this Agreement, all oil, gas, petroleum, minerals, hydrocarbon substances and kindred substances deposited in, lying under or flowing through said real property, other than as already excepted therefrom as set forth in Exhibit "A", together with the right to directionally drill, mine, operate and produce from lands other than said real property, oil and gas wells, tunnels and shafts into, through and across the subsurface of said real property without, however, the right to the use of or to pass through the surface or subsurface areas of said real property to a depth of 500 feet, measured vertically from the surface of said real property.

16. *Negation of Representations.*

Buyer certifies that he has inspected said real property either personally or through duly authorized agents and that this Agreement is entered into by him as a result of said inspection and not upon any representation made by Sellers

or any of them or of any of their representatives or of any selling agent. Sellers expressly make no representation with regard to the size or boundaries of said real property.

17. *Notices.*

Any notice required or desired to be given by Sellers to Buyer, or by Buyer to Sellers, shall be deemed properly given if by Sellers when enclosed in a sealed envelope addressed to Buyer at 737 Sea Ranch Drive, Santa Barbara, California 93110, and deposited in the United States mails, postage prepaid, and if by Buyer when enclosed in a sealed envelope and addressed to Sellers at Crocker National Bank, Santa Barbara Main Office, 1001 State Street, Santa Barbara, California 93101, and deposited in the United States mails, postage prepaid.

18. *Commission.*

If and only if the purchase and sale hereunder is consummated, Sellers shall pay to Harold A. Toso out of the proceeds due Sellers from the escrow hereunder, a fee in an amount equal to six percent (6%) of the purchase price under Paragraph 2 as the same may have been adjusted pursuant to Paragraph 10.

EXECUTED at Santa Barbara, California as of the date first hereinabove written.

/s/ Whitney A. Collins, trustee u/w
Margaret Whitney Wilcox 1/30th

/s/ Whitney A. Collins, trustee u/w
Roy F. Wilcox 1/30th

/s/ Dede Wilcox Eddy 1/15th

Denis H. Wilcox 1/15th

/s/ Richard K. Wilcox 1/15th

/s/ Julia Collins Haselton 1/15th

Crocker National Bank, successor
trustee u/w Margaret Whitney Wilcox 1/3rd

Crocker National Bank, successor
trustee u/w Roy F. Wilcox 1/3rd

"SELLERS"

/s/ Harold A. Toso

"BUYER"

Amendment
to
Agreement of Purchase and Sale.

THIS AGREEMENT is made June ...., 1974, by and between WHITNEY A. COLLINS, TRUSTEE u/w MARGARET WHITNEY WILCOX; WHITNEY A. COLLINS, TRUSTEE u/w ROY F. WILCOX; DEDE WILCOX EDDY; DENIS H. WILCOX; RICHARD K. WILCOX; JULIA COLLINS HASELTON; CROCKER NATIONAL BANK, successor TRUSTEE u/w MARGARET WHITNEY WILCOX; and CROCKER NATIONAL BANK, successor TRUSTEE u/w ROY F. WILCOX; all hereinafter collectively referred to as "SELLERS" and HAROLD A. TOSO, hereinafter referred to as "BUYER."

WITNESSETH

WHEREAS, the parties hereto, SELLERS and BUYER, entered into an agreement entitled "Agreement of Purchase and Sale" dated November 30, 1973, pursuant to which SELLERS agreed to sell and BUYER agreed to buy, subject to the provisions of the Agreement, certain real property particularly described in Exhibit "A" to said Agreement; and

WHEREAS, the parties hereto, SELLERS and BUYER, desire to amend said "Agreement of Purchase and Sale" to extend certain times for performance thereunder;

NOW, THEREFORE, in consideration of the premises, and the covenants and conditions contained herein, it is mutually agreed that the "Agreement of Purchase and Sale" previously entered into is hereby amended as follows:

1. Paragraph No. 3 of said "Agreement of Purchase and Sale," which Paragraph is entitled "Escrow," and consisting of a portion of page 4 of said

Agreement, is amended in its entirety to provide in full as follows:

"3. *Escrow.*

Upon the execution of this Agreement the same shall become a binding contract of purchase and sale upon the terms hereof and the parties shall in purchase thereof forthwith enter into an escrow with Crocker National Bank as escrow holder, executing the usual form of instructions employed by said escrow holder, calling for the performance of this Agreement in accordance with its terms, provisions and conditions and within the period of time provided herein. All documents and payments required of the parties (excepting payments herein provided to be made to Sellers outside of escrow) shall be delivered into such escrow. Said escrow instructions shall be and shall be therein expressly stated to be for the purpose of implementing this Agreement of Purchase and Sale and shall not be deemed to modify or affect the terms hereof.

Said escrow shall close on or before sixty (60) days after Buyer shall have received the approval of the City of Santa Barbara and any and all other governmental bodies, agencies and commissions whose approval is necessary for the Buyer's development of said real property in accordance with Paragraph 14 and the times for filing of a referendum petition to overturn any such approval and for appeals from any action with respect to such development by any governmental body, agency or commission have expired, but in no event later than November 30, 1974, except as extended as hereinafter provided.

If escrow has not closed on or before November 30, 1974, in accordance with the above provisions of this Paragraph 3, Buyer shall have the right, provided Buyer is not in default of obligations under this Agreement, to extend said escrow until five (5) days after the happening of one of the following events, whichever first occurs.

a) The rejection by the City of Santa Barbara or by one of the other government entities whose approval is necessary for Buyer's development of said real property in accordance with Paragraph 14. "Rejection," for purposes hereof, shall mean a negative decision by a government entity followed by the elapse of all applicable appeal times, or if an appeal is timely filed, the sustaining of the initial negative decision following the pursuit of all appeal remedies, both administrative and legal.

b) The condemnation of the whole of the subject property, as evidenced by the filing of a legal action to condemn in the form of a complaint filed with the appropriate court.

Anything in the foregoing provisions of this Paragraph 3 to the contrary notwithstanding, in no event shall the time for the close of said escrow continue beyond January 15, 1977.

Buyer shall have the right to cause said escrow to close at any earlier time than as specified in this Paragraph 3 by so notifying the SELLERS and the escrow holder any by depositing the sums and documents required therefor by the provisions of Paragraph 2 of this Agreement."

2. The escrow instructions referred to above shall be amended as required, to properly reflect this Amendment to the "Agreement of Purchase and Sale."

3. In all other respects, and except as specifically amended by this instrument, said "Agreement of Purchase and Sale" shall continue in full force and effect.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date first set forth hereinabove.

/s/ WHITNEY A. COLLINS, Trustee
u/w Margaret Whitney Wilcox
/s/ WHITNEY A. COLLINS, Trustee
u/w Roy F. Wilcox
DEDE WILCOX EDDY
DENIS H. WILCOX
RICHARD K. WILCOX
JULIA COLLINS HASELTON
CROCKER NATIONAL BANK, Successor
Trustee u/w Margaret Whitney Wilcox
CROCKER NATIONAL BANK, Successor
Trustee u/w Roy F. Wilcox

"SELLERS"

/s/ HAROLD A. TOSO

"BUYER"

APPENDIX 2.

Santa Barbara City Planning Commission Resolution No. 174.

SUBJECT: Application of Gerald B. Parent and Harold Toso for a change in land use zone classification, under provisions of Parts 2 and 24 of City Zoning Ordinance 2585, from E-1 and R-1 One Family Residents Zones to E-1-R-H and R-1-R-H One Family Residence Zones with a Resort Hotel overlay on City Parcels 41-330-01 and 47-010-28 & 29 for 65.4 acres, south of the intersection of Cliff Drive and Las Positas Road.

WHEREAS the City Planning Commission has held the required public hearing on the above application; and the applicant was present.

WHEREAS, 3 persons appeared to speak in favor of the application and 18 persons appeared to speak in opposition thereto, and the following exhibits were presented for the record:

a. Location and present zone map and proposed site plan.
b. Environmental Impact Report.
c. Letters from applicant.
d. Five letters in opposition.
e. One letter in support.
f. Letter from Henningson, Durham & Richardson.
g. Public Works Dept. Letter.
h. Letter from Certified Public Accountant.
i. Petition in opposition with 60 to 70 signatures.
j. Three revised site plans.
k. Revised landscape plan and golf course plan.

WHEREAS, the matter having been fully considered by this Commission, the Planning Commission finds as follows:

Findings:

This is an inappropriate location for R-H zoning. It would set an unfortunate commercial precedent for the Las Positas Valley and overall is an unwise land use decision.

There are too many questions about decentralizing the activities in the community when trying to revitalize the downtown area.

The Task Force study and the outcome of the redevelopment study should be considered.

The possible adverse effect of a major hotel here combined with the possibility of a major hotel in the redevelopment area on the labor force in Santa Barbara.

Possible impact on the present commercial area on the Mesa and the possible expansion as a direct result of this development.

There are reservations regarding the economic feasibility of the project in this location and the possibility that it will have to be converted to some other use at a future date.

The public input has generally been unfavorable towards the project and wish to preserve the present residential character of the area.

NOW, THEREFORE IT IS RESOLVED that the City Planning Commission hereby denies the subject request, subject to the following conditions:

Passed and adopted this 17 day of October, 1974, by the Planning Commission of the City of Santa Barbara, by the following vote:

AYES: 4
NOES: 3
Abstained: 0
Absent: 0

CITY PLANNING COMMISSION
SANTA BARBARA, CALIFORNIA

I hereby certify that the above Resolution was adopted by the Santa Barbara City Planning Commission at its meeting of the above date.

/s/ Maryanne Ruiz
Secretary

NOTE: This action of the City Planning Commission shall become effective 10 days from date of mailing of this resolution copy, unless appealed to City Council within that time, and shall remain in effect thereafter unless the conditions have not been met, or unless the ..... is unused, abandoned or discontinued for a period of 6 months.

(the above shall not apply to rezonings)

APPENDIX 3.

Decision and Findings of the City Council of the City of Santa Barbara in the Matter of the Appeal of Daon Corporation of a Denial of a Tentative Subdivision Map to Divide Assessor's Parcels Nos. 41-330-01, 47-010-28 and 47-010-29, Located South of the Intersection of Cliff Drive and Las Positas Roads.

WHEREAS, the application was filed with the City by DAON CORPORATION for approval of a tentative subdivision map to divide Parcels Nos. 41-330-01, 47-010-28 and 47-010-29 located south of the intersection of Cliff Drive and Las Positas Roads; and

WHEREAS, on February 7, 1980, at a duly noticed public hearing, the Planning Commission denied said application; and

WHEREAS, on February 28, 1980, the DAON Corporation filed with the City a timely appeal to the City Council from the Planning Commission decision; and

WHEREAS, on February 26, 1980, the City Council held a duly noticed public hearing on DAON Corporation appeal; and

WHEREAS, at the public hearing, the City Council received a report from the Planning Staff dated February 26, 1980 which included the preliminary reports of the Planning Staff to the Planning Commission and the reports of the Department of Public Works dated February 7 and 28, 1980. The Council also received oral and written testimony from the DAON Corporation, from members of City Staff. The City Council also considered the Environment Impact Report which had been prepared; and

WHEREAS, at the conclusion of the public hearing, the City Council continued the matter to its meeting on March 4, 1980.

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF SANTA BARBARA MAKES THE FOLLOWING DECISION AND ADOPTS THE FOLLOWING FINDINGS:

1. The appeal of the DAON Corporation is granted.

2. The tentative subdivision map is approved subject to the conditions attached hereto.

3. The City Council makes the following findings.

a. The tentative subdivision map, as conditioned herein, is consistent with the General Plan of the City of Santa Barbara.

b. The project as conditioned and approved mitigates, to the extent feasible by the City, the environmental effects identified in the Environment Impact Report. Mitigation measures are set forth in the staff report and in the conditions set forth below. Mitigation measures subject to approval or action of other agencies as identified in the EIR can and should be adopted by such agencies.

c. The project, as conditioned and proposed, meets the requirements of the General Plan, and the zoning and subdivision ordinances of the City. No further mitigation of the impact on air quality, alteration of the scenic character of the coast, and alteration of drainage is necessary or feasible by the City. Other development would have similiar impacts. The potential significant adverse effects have been mitigation by modifications made to the project by the applicant, and by the conditions imposed in this approval.